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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/176,124	10/21/1998	GERHARD SCHNEIDER	10191/857	7808

26646 7590 06/04/2002

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EXAMINER

TUNG, TA HSUNG

ART UNIT	PAPER NUMBER
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1743

DATE MAILED: 06/04/2002

24

Please find below and/or attached an Office communication concerning this application or proceeding.

MF=24

## Office Action Summary

Application No.

09/176124

Applicant(s)

SCHNEIDER BEAL

Examiner

T. TUNG

Group Art Unit

1743

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— The MAILING DATE of this communication appears on the cover sheet beneath the correspondence address —

## Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, such period shall, by default, expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

- ☒ Responsive to communication(s) filed on 4-17-02
- ☒ This action is **FINAL**.
- ☐ Since this application is in condition for allowance except for formal matters, **prosecution as to the merits is closed** in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11; 453 O.G. 213.

## Disposition of Claims

- ☒ Claim(s) 1, 3-7 is/are pending in the application.
- ☐ Of the above claim(s) is/are withdrawn from consideration.
- ☐ Claim(s) is/are allowed.
- ☒ Claim(s) 1, 3-7 is/are rejected.
- ☐ Claim(s) is/are objected to.
- ☐ Claim(s) are subject to restriction or election requirement

## Application Papers

- ☐ The proposed drawing correction, filed on \_\_\_\_\_ is ☐ approved ☐ disapproved.
- ☐ The drawing(s) filed on \_\_\_\_\_ is/are objected to by the Examiner
- ☐ The specification is objected to by the Examiner.
- ☐ The oath or declaration is objected to by the Examiner.

## Priority under 35 U.S.C. § 119 (a)-(d)

- ☐ Acknowledgement is made of a claim for foreign priority under 35 U.S.C. § 119 (a)-(d).
- ☐ All ☐ Some\* ☐ None of the:
  - ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_
  - ☐ Copies of the certified copies of the priority documents have been received in this national stage application from the International Bureau (PCT Rule 17.2(a))

\*Certified copies not received: \_\_\_\_\_

## Attachment(s)

- ☐ Information Disclosure Statement(s), PTO-1449, Paper No(s). \_\_\_\_\_
- ☐ Interview Summary, PTO-413
- ☐ Notice of Reference(s) Cited, PTO-892
- ☐ Notice of Informal Patent Application, PTO-152
- ☐ Notice of Draftsperson's Patent Drawing Review, PTO-948
- ☐ Other \_\_\_\_\_

Office Action Summary

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Claims 1, 3-5 are rejected under 35 U.S.C. 102(b) as being anticipated by Yamada '806 or Yamada '807.

Applicant argues that in '806 the bottom layer in figure 9 can not be considered as the "covering layer" presumably because it is the oxygen pumping layer and is actually a part of the oxygen measuring cell.

This argument is not persuasive. Applicant's claim language does not in any fashion exclude a pumping layer from being a "covering layer". Also, the wording "a measuring cell layer" (claim 1, line 4) is non-specific as to its detailed structure and is seen to be met by the concentration cell layer 13 (top layer in figure 9) of Yamada 806. Applicant is not permitted to claim an apparatus feature broadly and then argue that the language has a hidden narrow meaning that defines over the prior art. He may not have it both ways.

Incidentally, <sup>in Yamada '807</sup> the top layer in figure 9 is mislabelled as 13'a, which is actually one of the two intermediate layers. In this regard, see the discussion at col. 6, lines 37-42, which states that the intermediate layers 13'a and 13'b are sandwiched by top and bottom layers 13.

As for '807, the argument is similar to that against '806 and is similarly non-persuasive. Further, it is argued that the top insulating board 6, 26 prevents the heat from being distributed homogeneously over a cross-section of the sensor element.

This further argument is also not persuasive. The insulating board is apparently electrically-insulating, not thermally-insulating, and therefore should not affect the homogeneous distribution of heat. In any event, since the bottom insulating board 3, 23 of the heating element

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is made of the same material (alumina, spinel) as the top insulating board, whatever effect the insulating boards have on heat distribution should be the same over a cross-section of the sensor element.

Claims 1, 3-7 are rejected under 35 U.S.C. 103(a) as being unpatentable over Schneider et al '677 in view of Yamada '806 or Yamada '807.

Applicant argues that there is no suggestion or motivation to combine the references absent his own teaching.

This argument is not persuasive. It is common knowledge that electrolytic measurement is temperature-sensitive. Therefore, uneven heating that may lead to temperature gradient between different parts of a sensor element may lead to erroneous results. Also, it is fundamental physics that significant temperature gradient between different portions of one element can cause cracking from thermal stress. Applicant may not preempt an examiner's reliance upon common scientific principles as motivation for combining references by listing these principles in his specification. Otherwise, an applicant can merely set forth in his disclosure all possible reasons including well-known axioms for combining references and thus preclude any manner of combining references to reject a claim.

In regard to the wording of claim 3 as to the number of layers that is present in the final product of the measuring cell layer and the covering layer, applicant's refusal to address this issue is taken to mean that the language includes the situation wherein only one layer is present in each of the measuring cell layer and the covering layer.

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**THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the mailing date of this final action.

The examiner can be reached at 703-308-3329. His supervisor Jill Warden can be reached at 703-308-4037. Any general inquiries should be directed to the receptionist at 703-308-0661. A fax number for TC 1700 is 703-872-9311.



Ta Tung

Primary Examiner

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